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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KEVIN J. KINSELLA,

Plaintiff and Appellant,

v.

JAMS, INC. et al.,

Defendants and Respondents.

D073159

(Super. Ct. No. 37-2015-00026133-
CU-FR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John Meyer, Judge. Affirmed.

Degani Law Offices, Orly Degani; Goode Hemme & Peterson, Good Hemme & Barger and Jerry D. Hemme for Plaintiff and Appellant.

Long & Levit, Joseph P. McMonigle, Jessica R. MacGregor; Reed Smith and Paul D. Fogel for Defendants and Respondents.

INTRODUCTION

Kevin J. Kinsella appeals from a judgment in favor of JAMS, Inc. (JAMS) and the Honorable Sheila Prell Sonenshine (Ret.) on his claims that representations made in

biographies of Justice Sonenshine on the JAMS Web site were false or misleading in violation of the Consumer Legal Remedies Act (Civ. Code, § 1750, et seq.; CLRA), California's Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.; UCL), and False Advertising Law (Bus. & Prof. Code, § 17500, et seq.; FAL). Kinsella alleged he relied upon representations made in Justice Sonenshine's biography regarding her business experience when he stipulated to use her as a privately compensated judge to adjudicate his complex marital dissolution case. He claims he later discovered the representations about her business experience were either false or misleading. The jury did not reach a verdict on the question of whether there were misrepresentations regarding Justice Sonenshine's experience, but found any reliance on the representations was not a substantial factor in causing Kinsella harm. The court adopted the jury's finding and independently determined there was no causation on the equitable cause of action under the UCL or FAL.

Kinsella contends on appeal there was no substantial evidence for findings of no causation on the CLRA claim or for the court's further finding that there was no misrepresentation to support the UCL/FAL claim. Kinsella also contends the court's finding of no misrepresentation was tainted by judicial bias. We conclude there was substantial evidence to support both the jury's and the court's findings that Kinsella did not prove any reliance on the representations was a substantial factor in causing him harm. Because these findings are dispositive, we need not reach the issue of misrepresentation. We do not consider the issue of judicial bias, which was the subject of a prior petition for writ of mandate and was summarily denied. (*Kinsella v. Super. Ct. of*

San Diego County (Aug. 25, 2017, D072670) review den. Oct. 18, 2017, S244151.) We, therefore, affirm the judgment.¹

BACKGROUND

A

We begin with a summary of the evidence of Justice Sonenshine's background because it is relevant to Kinsella's claims. Sheila Sonenshine graduated from law school in 1970 and went into private practice. Over time, she focused her practice on family law and became a certified specialist in family law in 1978. She was appointed to the Superior Court of California, County of Orange in 1981 where she was assigned to the family law panel, served as the supervising judge of the family law panel, and started a settlement program for family law cases. She was appointed to the Court of Appeal in 1982 where she served for 17 years.

After leaving the bench, Justice Sonenshine started a company called EquiCo in 1999. The company offered mid-market companies education about the merger and acquisition process, an evaluation to see where they would fit in the market, and then the option to take the company to market. EquiCo was sold to a holding company owned by H&R Block in 2001. Justice Sonenshine was named as a Doe defendant in a case against the subsequent company, RSM EquiCo. She was dismissed from the case less than three months after she was named. She paid no money for settlement.

¹ We deny respondents' opposed request for judicial notice filed on November 20, 2018.

Justice Sonenshine conceived the idea of establishing the Escher Fund, which she described as a private equity fund focused on investing in women-owned or women-led businesses. The Escher Fund operated out of Justice Sonenshine's office at her home. It did not have designated telephone lines, computers, insurance, or supplies. It did not have an offering statement, which Justice Sonenshine agreed was a precondition to raising money from outside investors.

Justice Sonenshine was the sole member and principal in Escher Management, LLC. Escher Management, LLC was, to Justice Sonenshine's mind, the same as the Escher Fund.

Sonenshine Enterprises, a name Justice Sonenshine and her husband used for personal matters including investing and philanthropy, contributed the first money to the Escher Fund. The Escher Fund received no outside institutional funding. The Escher Fund invested in three women-owned or women-led businesses between 2005 and 2008. None of the businesses returned the investment, which Justice Sonenshine attributed to a global financial crisis.

Justice Sonenshine began thinking of going back into the law or doing alternative dispute resolution due to market conditions. Justice Sonenshine joined JAMS as a neutral judge in October 2008. The JAMS president and CEO knew she had been on the bench from 17 to 20 years and had been in the business world for many years. He knew her as an icon in the Orange County legal community.

In initial correspondence and meetings with JAMS, Justice Sonenshine provided information about her practice, her time on the bench, and the businesses she was

involved in after leaving the bench. They discussed the investment bank she opened as well as the fund she founded that helped women businesses.

JAMS's Web site provides information to the public for clients and prospective clients. The Web site provides one or more resumes for all neutrals. The first biography published on the JAMS Web site stated Justice Sonenshine founded the Escher Fund.²

B

1

Kinsella is a businessman who started two companies in San Diego in the early 1980s. He then became interested in venture capital and started four venture capital funds.

Kinsella met his wife in 1989 and they married in 1997. They owned several properties, including two homes in San Diego, a vineyard in northern California, and a property in Hawaii. They travelled extensively, using private jets at times. Kinsella and his wife separated in May 2012 and she filed for divorce in December 2012.

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Kinsella's attorney and Kinsella's wife's attorney agreed it would be appropriate to move the divorce proceedings from the superior court to a private judge due to the considerable worth of the estate and the pending settlement efforts by the parties. The attorneys agreed the family law court system can be overwhelmed with cases making it difficult to get matters timely heard. Additionally, Kinsella's attorney commented some

² Although Kinsella challenged other aspects of Justice Sonenshine's resume at trial, the opening brief states "only the Escher Fund is relevant to this appeal."

family law judges do not have the level of family law experience attorneys would like. A private judge Kinsella's attorney wanted to use was unavailable due to a conflict. Kinsella's attorney wanted to reserve another judge to use as a mediator. Justice Sonenshine's name came up as a private judge for all purposes due to her family law experience and reputation.

Kinsella's attorney knew Justice Sonenshine had a good reputation in family law and he had interacted with her at family law meetings. He knew she was a family law lawyer before becoming a judge. He also knew she had experience in the family law department in the superior court and was on the appellate court. Kinsella's attorney did not review Justice Sonenshine's resume on the JAMS Web site and does not recall providing it to Kinsella. Kinsella's attorney thought Justice Sonenshine was the best fit for the case under the circumstances since his first choice had a conflict. Kinsella's attorney and his wife's attorney did not discuss Justice Sonenshine's business experience.

Kinsella's attorney encouraged Kinsella to look at Justice Sonenshine's resume on the JAMS Web site. Kinsella spent 10 to 15 minutes looking at a resume, although he does not remember which resume he reviewed. He stated he was not able to judge her judicial credentials, but focused on her business experience.

Kinsella stated he was impressed by Justice Sonenshine's listed business experience. Kinsella claimed he was looking for a person who would understand his separate property and he thought he had "hit a grand slam home run" when he read her resume because she claimed she was the founder of an international mergers and acquisitions firm with a presence in Europe and that she had raised and run a private

equity fund. He said he thought he had "hit the jackpot" because she would understand what he did for a living.

Kinsella said he was not interested in her experience regarding family law and did not look at those portions of her resume. He stated he would take the recommendation of his attorney, a family law specialist, regarding a private judge's family law experience.

Kinsella did no additional research regarding Justice Sonenshine. Kinsella did not discuss his review of Justice Sonenshine's resume with his assistants and did not ask them to do research regarding Justice Sonenshine before he agreed to use her as a privately compensated temporary judge in January 2013. Kinsella did not ask for information about the Escher Fund between December 2012 and January 2013. Kinsella agreed to hire another private judge for settlement discussions.

The parties engaged in settlement discussions starting in the fall of 2012. In January 2013 negotiations broke down over a dispute about artwork. Justice Sonenshine denied Kinsella's wife's ex parte request to hear a motion involving the purchase of a painting. Kinsella's attorney thought Justice Sonenshine handled the proceeding professionally.

The parties exchanged settlement proposals in April 2013 and the attorneys remained hopeful the case would settle. Shortly thereafter, however, Kinsella fired his first attorney and replaced him with another attorney. Kinsella took the settlement proposals off the table, claiming he had discovered "game-changing" computer records regarding his net worth prior to the marriage.

Kinsella's new attorney served Kinsella's wife's attorney extensive written discovery. After the new attorney started, Kinsella's theory of the case changed regarding the extent of his separate property and the amount Kinsella's wife would owe in the divorce proceedings.

Justice Sonenshine held five days of hearings on the issue of temporary spousal support, two days in July and three days in November 2013. Kinsella's wife presented testimony from a forensic accountant. Kinsella did not present testimony from a forensic accountant. Kinsella testified he was not pleased with how Justice Sonenshine conducted the proceedings and said he did not like her decorum.

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Kinsella told one of his assistants he believed Justice Sonenshine was biased against men and he was going to try to remove her from the case. The assistant did not recall him saying he believed she lacked business experience. Kinsella asked to withdraw the stipulation to Justice Sonenshine as the private judge stating he could no longer afford a privately compensated judge.

Justice Sonenshine made an interim spousal support order in February 2014. Justice Sonenshine's statement of decision did not determine the issue of separate or community property, noting she granted Kinsella's motion to bifurcate for trial the characterization of certain assets. Kinsella was unhappy with the decision and the amount ordered for monthly temporary spousal support.

On the same day as the decision, Kinsella filed a substitution of attorney form indicating he was representing himself. He wrote to Justice Sonenshine saying he was

self-represented, which he believed required her to recuse herself. Although he maintained he was representing himself, he continued paying five lawyers to assist him over the next several months.

Shortly thereafter, Kinsella hired a private investigator because he said he thought, based on Justice Sonenshine's rulings, she did not have the business experience claimed on her resume. Kinsella directed the investigator to conduct an open-source investigation of Justice Sonenshine's resume. Kinsella also hired college students to analyze or fact-check information on Justice Sonenshine's resume. Kinsella asked the investigator to investigate Justice Sonenshine's family members, including her husband, daughter, and daughter-in-law.

At the initial meeting with the investigator, Kinsella had Justice Sonenshine's general biography and the investigator had the family law biography. The investigator later learned Justice Sonenshine had seven biographies listed on the JAMS Web site. Neither Kinsella nor the investigator had the business/commercial biography or the financial markets biography at the initial meeting.

Kinsella stated the investigator could find no information about the Escher Fund on the Internet. Kinsella concluded it did not exist.

Kinsella wrote a letter to Justice Sonenshine in April 2014 asking her to recuse herself. He raised issues regarding representations she made about her involvement in the Escher Fund and EquiCo, including the fact that EquiCo had been sued for fraud in a large class action, which later settled. Justice Sonenshine responded by defending the accuracy of her resume, but she recused herself in the interests of justice.

Kinsella accused his wife's attorney of colluding with Justice Sonenshine.

Kinsella threatened to and did report his wife's attorney to the state bar.

The Kinsella matter returned to the superior court. Kinsella requested modification of the temporary spousal support order. The superior court judge heard the matter in December 2014 and made a finding on an issue not previously litigated with Justice Sonenshine. Kinsella challenged the judge handling the divorce proceedings in the superior court, claiming he was biased.

C

About a year later, Kinsella's lawyer wrote to JAMS alleging violations of the CLRA by Justice Sonenshine and JAMS, demanding correction of Justice Sonenshine's resume and seeking restitution for fees Kinsella spent at JAMS. Kinsella paid JAMS about \$80,000 for the divorce matter.

Kinsella sued JAMS and Justice Sonenshine for misrepresenting Justice Sonenshine's background related to EquiCo and the Escher Fund on her biography. He asserted causes of action for violation of the CLRA, fraud, negligent misrepresentation, and violations of the UCL. During trial Kinsella dismissed common law causes of action for fraud and negligent misrepresentation and presented to the jury only the CLRA cause of action.

After a three-week trial, the jury was unable to reach a verdict on the question of whether there were misrepresentations regarding Justice Sonenshine's experience, but found 11 to 1 that any reliance on the representations was not a substantial factor in

causing Kinsella harm. The court adopted the jury's finding and independently determined there was no causation on the equitable cause of action under the UCL/FAL.

DISCUSSION

Kinsella's primary argument on appeal is that the findings of no causation are not supported by substantial evidence because it is undisputed that Kinsella paid JAMS over \$80,000 and he contends there was no evidence he would have incurred that cost if he had not stipulated to Sonenshine as a private judge. We disagree.

"Under Civil Code section 1780, subdivision (a), CLRA actions may be brought 'only by a consumer "who suffers any damage *as a result of the use or employment*" of a proscribed method, act, or practice. (Italics added.) "This language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." [Citation.] Accordingly, "plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366–1367 (*Durell*)).) A plaintiff must show "that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct." [Citation.]' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 919.)

Likewise, a private plaintiff asserting a claim under the UCL or FAL " 'must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition.' " (*Durell, supra*, 183 Cal.App.4th at p. 1359;

Bus. & Prof. Code, §§ 17204, 17535.) A plaintiff must plead and prove facts showing he or she suffered economic injury because of his or her reliance on the truth and accuracy of the defendant's representations. (*Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 330–331, citing *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 327.)

" ' "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." [Citation.] The substantial evidence standard of review is applicable to appeals from both jury and nonjury trials. [Citation.]' " (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489 (italics omitted).)

Kinsella's argument attempts to turn the burden of proof on its head. Although there was no dispute about the amount of money Kinsella paid to JAMS for Justice Sonenshine's services, Kinsella did not meet his burden of establishing he would not have incurred the fees for a private judge, either Justice Sonenshine or another private judge, if it were not for the alleged misrepresentations. He did not establish he would not have

incurred the same or similar amount of costs either to JAMS or to another private judging service.³

Both Kinsella's attorney and Kinsella's wife's attorney agreed it was appropriate to retain a private judge for this case given the value of the estate and the settlement posture of the parties. This is typical for divorce cases involving a considerable amount of money. They stipulated to another private judge to conduct settlement conferences. Justice Sonenshine was not Kinsella's attorney's first choice for a private judge for purposes of the litigation. Neither Kinsella nor his attorney testified that they would not have used another private judge if Kinsella had not agreed to Justice Sonenshine or if she was unavailable.

The jury easily could have found Kinsella's testimony incredible about his focus on Justice Sonenshine's business background at the time he stipulated to use her as a private judge. Kinsella said he spent only 10 to 15 minutes reviewing the JAMS Web site and Justice Sonenshine's general resume. He did not discuss with his staff members Justice Sonenshine's business background. He did not do additional research or investigation about Justice Sonenshine's business background.

Kinsella had no interest in Justice Sonenshine's experience as a family law expert, which was the important aspect of her background for Kinsella's attorney. Kinsella admitted he would defer to his attorney regarding the appropriate family law experience for hiring a private judge. "If they're being recommended by my attorney who's a family

³ The hourly cost for JAMS neutrals range between \$300 to \$1000. Justice Sonenshine's hourly rate of \$550 is average.

law specialist, I would take their recommendation, and that's what happened." This evidence supports an inference that even if Kinsella had known about any misrepresentations and had chosen not to stipulate to Justice Sonenshine, he would have taken any recommendation of his attorney to hire a different private judge.

The evidence also supported an inference Kinsella became interested in Justice Sonenshine's resume only when he became displeased with her rulings, felt she was biased against men, and decided he wanted her off the case. Kinsella knew one had to have reasons to remove a judge. Kinsella attempted to remove Sonenshine first by arguing he could not afford a private judge, then by purporting to represent himself in *propria persona*, and then by hiring a team of individuals to investigate Justice Sonenshine's resume and to dig up "dirt" on her family.

JAMS presented evidence from a family law specialist stating complicated divorce cases typically use privately compensated temporary judges. The specialist described the computer systems used to determine temporary spousal support and stated Justice Sonenshine's temporary spousal support order applied the standard formula. He explained both private and public judges use the same process for analyzing property division and spousal support so nothing was lost by using Justice Sonenshine's services and then switching decision makers. Kinsella presented no evidence to the contrary.

Therefore, we conclude there was substantial evidence to support both the jury's and the court's independent findings that Kinsella failed to establish the essential element of causation of economic harm as to both the CLRA and the UCL/FAL claims. Because

this issue is dispositive, we need not reach the issue of whether there was evidence of misrepresentation.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.